# Supreme Court of the United States

OCTOBER TERM, 1944.

No. 518

M. C. GARBER, PETITIONER,

VS.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, AMY TRESNER, NEE CREWS, AND MARY WILLIS, NEE CREWS, RESPONDENTS.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

P. C. SIMONS,
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*Attorneys for Petitioner.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Your petitioner, M. C. Garber, respectfully shows to the court:

1.

### STATEMENT OF THE MATTER INVOLVED.

An action was instituted in the District Court of Garfield County, Oklahoma, on December 14, 1931, by the re-

spondents as plaintiffs against the American National Bank of Enid and others as defendants and their amended petition upon which the case was tried, was filed in said court on July 8, 1933 (For this amended petition, see Record pages 236-284). This action came to trial in that court in the month of October, 1937, and resulted in a verdict and judgment thereon against the defendant, American National Bank of Enid alone on October 29, 1937, for the sum of $249,000 (For journal entry of that judgment, see Record pages 284-287). Upon trial of that case, the court sustained the demurrers of the individual defendants to the evidence and dismissed the case as to them. The individual defendants were part of the former directors of the American National Bank.

The basis of that action was that on June 13, 1922, the respondents, through their representatives, had entered into a contract with the Garber Refining Company of Garber, Oklahoma (see Record pages 282-284), whereby the Garber Refinery contracted to purchase from them the oil produced from certain lands belonging to them upon which the Sinclair Oil and Gas Company held an oil and gas mineral lease and they were engaged in litigation with it in which they sought to cancel the lease. The proceeds of the sale of this oil were to be deposited in the Farmers State Bank of Garber, Oklahoma, in escrow, out of which the respondents were to be paid their one-eighth royalty plus certain allowances for expenses of development and the balance was to be invested in United States Government Bonds, pending the outcome of such litigation.

A large amount of money was deposited in that bank over a period of years and in 1930 the litigation was compromised and the respondents made demand upon the Farmers State Bank of Garber for their bonds and money.

Soon thereafter events transpired which revealed the

fact that practically all of the money deposited in that bank and the bonds purchased therewith had been dissipated and that the bank was unable to produce the same.

The American National Bank had acted as a correspondent bank for the Farmers State Bank of Garber and the original action brought by the respondents against the American National Bank was instituted upon the contention made by them that certain of the officers and representatives of the American National Bank had aided and abetted the Farmers State Bank of Garber and certain of its officers and representatives in misappropriating and dissipating the funds deposited in that bank and the bonds purchased therewith.

The directors of the American National Bank who were individually made defendants in that action were exonerated but judgment was rendered against the bank. The officers and directors of the bank who were charged with the commission of the wrongful acts were named as defendants but no service of summons was ever had upon them and they never in fact became parties to the case.

After that judgment was obtained, this action was filed in the District Court of the United States for the Western District of Oklahoma to collect that judgment. The defendants were those who had been the stockholders and directors of the American National Bank. There were three causes of action set forth in the complaint involving the following state of facts:

On November 25, 1929, the American National Bank of Enid sold practically all of its assets and its business to the First National Bank of Enid, which on its part, assumed all of the known liabilities of the American National Bank. A copy of the contract between these banks is found in the record, pages 211-216. The First National Bank agreed to pay the American National Bank the sum

of $350,000 in addition to taking over responsibility for its deposits and all known obligations. Of this amount $240,000 in cash was paid to the American National Bank; $100,000 was retained to guarantee collection of the paper taken over by the purchasing bank; $10,000 by permitting the selling bank to retain certain real estate. This transaction was consummated on November 25, 1929, and the business and assets of the American National Bank were, on that date, turned over to the First National Bank of Enid and it took over the business.

It is an agreed fact in this case that the American National Bank of Enid was, up to that date, a solvent and going concern, leaving out of consideration the claim thereafter asserted by the respondents by the filing of their action against the American National Bank and some of its directors on December 14, 1931. Also, that there were no other creditors of the American National Bank than the respondents (See statement of matters stipulated at page 109 of Record).

> "(c) That there are no creditors of the American National Bank of Enid, other than the plaintiffs in this action."

The trial court in his findings of fact also made a finding to that effect (See Record page 134). The trial court also found (See Record page 134):

> "10. Until November 25, 1929, the bank was a going concern and was believed by all the defendants here defending to be a solvent as well as a going concern."

**Stipulation of Facts As to M. C. Garber.**

The following stipulation of facts relating to petitioner, M. C. Garber, was entered into (see Record page 113, paragraph 15):

"15. That on November 14, 1929, the defendant, M. C. Garber, for a valuable consideration sold and delivered to the defendant, D. J. Oven, his stock in the American National Bank of Enid, being 125 shares, and the certificate evidencing the same was duly endorsed by the said M. C. Garber and transferred to the said D. J. Oven; that such certificate was duly surrendered to the American National Bank of Enid, and a new certificate No. 100, for such 125 shares of stock was, on November 14, 1929, issued and delivered to the said D. J. Oven; that on November 14, 1929, and up to November 25, 1929, the date the American National Bank of Enid, sold its business and assets to the First National Bank of Enid, the American National Bank of Enid, was a solvent and going concern, not taking into consideration and excluding the claim of the plaintiffs in this case, upon which they filed suit on December 16 1931, and which claim was subsequently reduced to judgment in that action and is the $249,000.00 judgment which is the basis of this action; that the circumstances of such sale of his stock by the said M. C. Garber to the said D. J. Oven were that a few days prior to November 14, 1929, the said D. J. Oven went to the said M. C. Garber and sought to purchase from him his stock in the American National Bank. That the said M. C. Garber thereupon told him that he would take the matter under consideration and advise him later. That a few days later the said D. J. Oven again saw the said M. C. Garber, and the said M. C. Garber advised him that he had considered the matter and concluded that if the said D. J. Oven would buy his stock in the American National Bank and also some stock which he owned in the American National Mortgage Company and the American Building Company so as to clean up his investment in all these companies, that he would sell provided that they could agree upon the price.

"That they thereupon did agree upon the price for the stock of the said M. C. Garber in the American National Bank and in the other companies mentioned, the

total price for all being $25,625. That the sale was consummated on November 14, 1929, and the said D. J. Oven paid him for such stock by giving him a check for $625 and five promissory notes for $5,000 each due at intervals and which notes were paid before they became due in the month of December, 1929.

"That it shall be considered, that, subject to objection as to its competency, relevancy and materiality by plaintiffs, the defendant, M. C. Garber, testified: that at the time of such negotiations and of the consummation of the sale of such stock by M. C. Garber to D. J. Oven, on November 14, 1929, the said M. C. Garber had no information to the effect that the American National Bank contemplated selling its assets and business to the First National Bank and going out of business, and that at such time the defendant, M. C. Garber knew nothing of any claim by the plaintiffs against the American National Bank and believed the American National Bank to be fully solvent at such time, and had no knowledge of any impending failure of the American National Bank, and the sale of his stock by the said M. C. Garber was made in good faith and without any intention of trying to avoid liability as a stockholder in such bank."

In the Findings of Fact and Conclusions of Law made by the trial court, paragraphs 14 and 15 (see Record page 137) is the following:

"14. The defendant, M. C. Garber, at the solicitation of D. J. Oven (a defendant here), on November 14, 1929, sold the said D. J. Oven his entire holding of 125 shares of stock in the Bank, together with other stocks. The sale was consummated after several days consideration, the stock certificates regularly endorsed, delivered and surrendered for transfer, and a new certificate for the full amount thereof was issued and delivered to said D. J. Oven. The total consideration for the entire transaction was $25,625 which was paid in due course, and admittedly included a valuable consideration for the bank stock.

"15. The sale was made by Judge Garber, without any information on his part of any impending failure of the Bank, or that it contemplated going out of business or selling its assets, and without any knowledge that the Crews heirs had a claim against the bank, and in the belief that the Bank was solvent. His claim of good faith is not disputed."

The petitioner, M. C. Garber, owned 125 shares of stock of the par value of $100 per share in the American National Bank. On November 14, 1929, prior to the sale of its business by the American National Bank to the First National Bank of Enid, he sold all of this stock to D. J. Oven and on that day he surrendered his certificate of stock and the transfer was entered on the books of the bank and a new certificate was issued to the said D. J. Oven.

After the sale of its business by the American National Bank to the First National Bank of Enid, the sum of $240,000 was, by the directors of the American National Bank, paid back to those who were the stockholders of the American National Bank on November 25, 1929, representing the par value of their stock plus their proportionate part of the surplus of the bank. The petitioner, M. C. Garber, received no part of this fund, he not being a stockholder at that time.

In the first cause of action in this case, the plaintiffs as a judgment creditor of the American National Bank, sought to recover back from its stockholders the $240,000 which had been paid to them claiming that it constituted a trust fund for their benefit and which they were entitled to pursue and recover back.

In the second cause of action they sued the stockholders for double liability. M. C. Garber was made a defendant to this second cause of action and they sought to recover from him upon the theory that he had sold his stock within sixty days next before the date of the failure of the

American National Bank to meet its obligations or with knowledge of such impending failure.

The third cause of action was against a part of those who had been directors of the American National Bank claiming that they had violated their duties as such directors in disbursing this fund of $240,000 and paying the same back to the stockholders.

In the trial court the case was tried to the court without a jury and went to judgment on September 16, 1943 (see Record page 151). On the first cause of action, judgment was rendered against all of the stockholders for the amount of money which had been returned to them, representing their investment in the capital stock of the bank plus surplus.

On the second cause of action the court rendered a personal judgment against all stockholders for $15.17 per share and retained jurisdiction as to all matters pertaining to the necessity of and the making and enforcement of additional assessments against share holders and the liability therefor (see Record page 162).

It was on the second cause of action that judgment was rendered against the petitioner, M. C. Garber (see Record paragraph 13, page 158). It was from this judgment that he appealed to the United States Circuit Court of Appeals for the Tenth Circuit and which court, on July 6, 1944, rendered its judgment affirming the judgment of the trial court against this petitioner and rendered its opinion in said cause (see Record page 430-432.

Petitioner, M. C. Garber, as well as other appellants in that action, filed a petition for rehearing in the Circuit Court of Appeals and on August 26, 1944, that court by its order denied the petition for rehearing of the said M. C. Garber and filed an additional opinion as to him on rehearing on said date of August 26, 1944 (see Record page 455-456.

The third cause of action has gone out of the case. The trial court rendered judgment on that cause of action against those of the directors of the American National Bank who had been made defendants on that cause of action for $188,280 plus interest and costs. From that judgment, the directors prosecuted an appeal to the Circuit Court of Appeals and by which court that judgment was reversed with directions to dismiss such third cause of action and which reversal has become final.

Several Petitions for Certiorari will be presented to this court by certain of the original defendants in the first and second causes of action and which judgments were affirmed by the Circuit Court of Appeals, by its judgment and opinion of July 6, 1944, and whose petitions for rehearing were likewise overruled and denied on August 26, 1944, but inasmuch as all of such appeals and the Petitions for Certiorari presented by these separate petitioners in this court stem from the same case and are based upon the record in that case, but one transcript of the record will be sent to this court from the Circuit Court of Appeals for the Tenth Circuit and this Petition for Certiorari will be based upon such record as well as others that will be also filed.

## STATEMENT AS TO JURISDICTION.

This court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of 28 U. S. C. A., Section 347. The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 6, 1944; Petition for Rehearing denied August 26, 1944.

The date of this Petition for Certiorari is September 25, 1944.

## THE QUESTIONS PRESENTED.

1. Whether the petitioner as a former stockholder in the American National Bank of Enid, Oklahoma, is subject to assessment as a stockholder in said bank under the provisions of Para. 64, Title 12, U. S. C. A., he having made a *bona fide* sale of his stock for valuable consideration in good faith on November 14, 1929, more than sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure and where, at the time of such sale, such bank was a solvent and going concern except for an undisclosed and unknown liability to a creditor which was not asserted until a suit was filed by such creditor on such claim more than one year subsequent to the sale by petitioner of his stock, and where such claim was unknown to the creditor filing such suit for more than a year after the sale of such stock and upon which claim the creditor recovered a judgment against such bank on October 29, 1937, nearly eight years after the sale by petitioner of his stock in said bank, and where it is an agreed fact in the case that except that the bank in question was a solvent and going concern and that there is no other creditor of said bank, and where the sale of such stock was made by petitioner in good faith and without any intention of trying to avoid liability as a stockholder in such bank.

2. Whether a stockholder or former stockholder in a national bank is subject to assessment under the double liability provisions of Sec. 64, Title 12, U. S. C. A., for the payment of a judgment against the bank based upon a tort arising out of the wrongful acts of some of its officers and representatives and whether a judgment based upon such tort is embraced within the language "contracts, debts and engagements of such association."

3. The lower court erred in holding that the cause of action of the plaintiffs against this petitioner, defendant, was not barred by the Statute of Limitations of the State of Oklahoma and by reason of laches.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The interpretation placed by the Circuit Court of Appeals upon that part of the language of Par. 64, Title 12, U. S. C. A., reading as follows:

> "The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer,"

is erroneous and is in conflict with the applicable decisions of this court and other federal courts and of state courts and the interpretation so placed upon that part of Section 64 is not the correct or true meaning thereof.

That the Circuit Court of Appeals in its original decision disposed of this question in the following language quoted therefrom (see Record page 430)

"Insolvency of the Bank."

> "The American National Bank closed its doors as a banking institution on the evening of November 25, 1929. Thereafter it did no banking business. The $240,000 involved in this suit was distributed to the stockholders in December, 1929. After its distribution, the only asset the bank had was the right to receive an additional $100,000 from the First National Bank of Enid when the paper which it had guaranteed was

paid, but its total liability on its guarantee of paper amounted to $138,591.48. In addition, it had outstanding appellees' claim of $249,000.

"A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A., Sec. 21 *et seq.*, when it is unable to meet its obligations when they mature. While appellees' claim was contingent and unknown at the time the bank closed its doors, it must be considered in determining the solvency of the bank. It is quite obvious that the American National Bank was wholly unable at any time after it closed its doors on the evening of November 25, 1929, to meet its obligations and that its insolvency dates from that time. All stockholders, including appellant, M. C. Garber, in No. 2783, who transferred their stock within sixty days prior to November 26, 1929, were liable for the stock assessments even though the transfers were made in good faith."

In its opinion on Petition for Rehearing handed down on August 26, 1944, the Circuit Court of Appeals again considered this question and disposed of it in the following language, to-wit (See Record, page 453)

"M. C. Garber, appellant in Number 2873, has filed a petition for rehearing in which he contends that we misinterpreted 12 U. S. C. A., Sec. 21 *et seq.*, as it affects the liability of one who transfers stock in a banking institution. It is contended that we established the date on which it was determined that the bank was insolvent in the sense that its liabilities exceeded its assets rather than the date on which the bank failed to meet its obligations when they matured as the date which determines the liability of one transferring stock. With this we cannot agree. We agree that it is the date on which a bank fails to meet its obligations that determines the liability of one transferring his stock. It is true that the word 'insolvency' is not used in the applicable statute. The opinion could well have omitted the use of the word 'insolvency.' However,

there can be no question as to the sense in which we used the term. We defined insolvency for the purpose of determining the liability of one transferring stock as being the failure of a bank to meet its obligations when they mature. We said: 'A national bank is insolvent within the meaning of the National Bank Act, 12 U. S. C. A., Sec. 21 *et seq.*, when it is unable to meet its obligations when they mature.' Inability to meet its obligations is the test which establishes the liability of one transferring stock. We do not understand the law to require that a claim be actually presented for payment and that payment be refused before liability attaches. We know of no case holding to that effect. Certainly the case of *Brown* v. *Rosenbaum*, 41 N. E. 2d 77, upon which appellant relies, does not so hold. It holds that where a bank is closed and a conservator is appointed, the day on which the bank was closed may determine both the date on which the rights of creditors and the liabilities of stockholders attach. In *People* v. *Merchants' Trust Co.*, 79 N. E. 1004, it was held that the appointment of a temporary receiver and the taking of assets by him operated to prevent the defendant from paying the claims of creditors and therefore obviated the necessity of a formal demand for payment. In *Broderick* v. *Aaron*, (N. Y.) 197 N. E. 274, 103 A. L. R. 684, the superintendent of banks took possession of a bank on December 11, 1930. It did not appear that on that date the bank was actually insolvent. The court held that 'none the less the closing of the bank occasioned an automatic default in the payment of its debts and liabilities.'

"Garber sold his stock November 14, 1929. The bank disposed of its business and closed its doors November 25, 1929, and did not function as a banking institution thereafter. It went into voluntary liquidation and appointed a liquidating agent December 20, 1929. The directors distributed the $240,000 received from the First National Bank of Enid some time in December, 1929, to the stockholders of record as of November 25. Thereafter the bank had not a single dollar

with which to meet any claim. Its doors were closed and it had ceased to function as a banking institution. The presentation of a claim for payment after that would have been a mere formality. By this course of conduct the bank automatically disqualified itself from meeting any of its obligations. To hold that it was still necessary that a claim be presented and dishonored before a stockholder's liability attached would be adopting a strained construction, entirely out of line with the purpose sought to be accomplished by the statute.

"The petition for rehearing is Denied."

We contend that this additional opinion by the Circuit Court of Appeals is likewise an erroneous interpretation of the federal statute in question and in conflict with the applicable decisions of this court and other federal courts and state courts.

2. The Circuit Court of Appeals erroneously interpreted that part of the language of Sec. 64, Title 12, U. S. C. A., providing that the stockholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association each to the amount of his stock therein for a judgment rendered against such bank based upon a tort and which interpretation, we contend, is in conflict with the applicable decisions of this court, other federal courts and state courts. The Circuit Court of Appeals held that a stockholder in a bank was liable under the provisions of the double liability law for the payment of a judgment against the bank based upon tort, and that such a judgment came within the classification "contracts, debts and engagements of such association." This, we contend, is an erroneous interpretation placed upon the language above quoted and that a stockholder is not liable under the double liability law for the payment of a judgment based upon tort arising out of the wrongful acts of its officers, agents and employees.

In deciding this question, the Circuit Court of Appeals disposed of the matter in the following language (see Record page 42):

"Liability Not Within 12 U. S. C. A., Secs. 63, 64."

"It is contended that the transaction out of which appellees' judgment arose did not constitute a 'contract, debt or engagement,' as those terms are used in 12 U. S. C. A., Secs. 63, 64, for which stockholders become liable for assessment upon their stock. Authorities are cited in support of the contention that a judgment against a bank based on tort is not a contract, debt, or engagement of the bank within the meaning of similar statutory provisions. We deem it unnecessary to discuss these decisions, because we believe that as far as the national bank act is concerned, the question is settled by the decision of the Supreme Court in *Oppenheimer* v. *Harriman Bank*, 201 U. S. 206. In that case the Supreme Court interpreted these very terms of the statute. The judgment there also sounded in tort. Involved was the right of the holders of such a judgment to have it satisfied out of the assessments on stockholders' liability. The court pointed out that the statute should be reasonably construed in favor of claimants. Speaking of the terms 'contracts,' 'debts,' and 'engagements,' the court said:

> 'They are broad enough to include all pecuniary liabilities and obligations of the bank. Indeed, that is a well-recognized meaning of the word "engagement." Plaintiff's claim is for the money the bank fraudulently got from him and used in its business. Clearly that liability is covered by the phrase "contracts, debts and engagements" (Page 213).'

The construction for which appellants contend cannot be sustained."

It will be observed that the Circuit Court of Appeals rested its decision on the decision of this court in the case

of *Oppenheimer* v. *Harriman Bank*, 201 U. S. 206, 81 L. Ed. 1042, in which this court used the following language:

> " 'contracts, debts and engagements' used in the above section, includes all pecuniary liabilities and obligations of the bank."

We contend that there is a clear distinction between the facts in that case and the ones in the case at bar and that it was not intended by this court in using the language quoted to mean that a stockholder of a bank becomes liable for all of the torts committed by the officers and agents and employees of the bank and that if the language used by this court is susceptible of that interpretation and meaning, then that question should be reconsidered by this court for the reason that it is in conflict with former decisions of this court and other federal courts and this question should be set at rest by this court in unequivocal language and which is a matter of great importance to the national banking business generally.

3. This assignment involves the question of the Statute of Limitations and of laches which will be referred to in the supporting brief.

In order to avoid duplication, we will further present our reasons relied on for the allowance of the Writ in our supporting brief hereunto annexed.

For these reasons it is respectfully submitted that this petition should be granted.

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SIMONS, MCKNIGHT, SIMONS, MITCHELL & MCKNIGHT,
*Attorneys for Petitioner.*

## SUPPORTING BRIEF.

**Upon the question of the interpretation of that part of Par. 64, Title 12, U. S. C. A., providing that stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations or with knowledge of such impending failure shall be liable to the same extent as if they had made no such transfer.**

The American National Bank never did fail as a bank; there was no failure on its part to meet its obligations within sixty days from November 14, 1929, the date when M. C. Garber sold his stock to D. J. Oven. The bank sold its asets and business to the First National Bank of Enid, Oklahoma, on November 25, 1929, and the purchasing bank assumed responsibility for its deposits and all of its known obligations. The claim of the plaintiffs (respondents) was not asserted until they filed their suit against the American National Bank on December 14, 1931. They did not know that they had any such claim until within a year prior to the filing of their suit. In the meantime, the American National Bank was voluntarily liquidated. No receiver or conservator was ever appointed for it. Upon closing out its business it refunded to the stockholders their investment in the capital stock and surplus of the bank, no part of which was received by M. C. Garber, and no claim was made against him on the first cause of action. He is only interested in the claim asserted in the second cause of action under the double liability provisions of Section 64.

We have heretofore quoted the decision of the Circuit Court of Appeals disposing of this question both in its original opinion and on rehearing.

Not a suggestion can be found in the record of any obligation or claim which the American National Bank failed to meet within sixty days after November 14, 1929, the date of the sale of his stock by petitioner, nor for a much longer period, the fact being as found by the lower court that there is no other creditor than the plaintiffs (respondents) in this case.

The statute under which the plaintiffs (respondents) seek to fasten liability on M. C. Garber, was passed for the purpose of preventing stockholders in a bank which was about to fail or who had knowledge of its impending failure from transferring their stock to irresponsible persons and thereby evading liability to the creditors of the failing bank and holding the stockholder liable if he made such a sale within such period of time.

The Circuit Court of Appeals fell into an error in interpreting the part of Section 64 in question and in holding that a stockholder who had sold his stock was liable under the double liability provision if such bank was insolvent at the time of such sale notwithstanding the fact that it was a going concern and continued to be for more than sixty days after such sale and in holding that the judgment recovered by the plaintiffs (respondents) against the bank on October 29, 1937, was retroactive and rendered the bank insolvent on November 25, 1929, the date when it sold its business and assets and that it was unable to pay its obligations and therefore had failed to meet its obligations on that date on account of the adjudication of the claim of plaintiffs (respondents) nearly eight years thereafter.

Such interpretation we contend, is clearly in conflict with the former decisions of this court, other federal courts and state courts.

The statute in question does not in words prohibit the sale of stock when a bank is insolvent as insolvency is properly defined and interpreted by the decisions of this court, but only creates such liability where the stock is sold within sixty days next before the failure of the association to meet its obligations or with knowledge of such impending failure.

Even if the word insolvent had been used, it would not justify the finding of the trial court in this case or the decision of the Circuit Court of Appeals that the American National Bank was insolvent on November 14, 1929, and on November 26, 1929, the day after it ceased to do business. The court found that the bank was solvent at those times excluding the claim of the Crews heirs and could only find that the bank was insolvent upon the theory that the judgment obtained by them on October 29, 1937, was retroactive for the purpose of determining not only the solvency of the bank but that the bank had failed to meet its obligations within sixty days after November 14, 1929, which we contend is not the law and cannot be true under the situation in this case.

One of the land-marks in the adjudicated cases on this question is *Earle* v. *Carson*, 187 U. S. 42, 47 L. Ed. 373, in which the opinion was written by Mr. Justice White, and while it is true that this case was decided prior to the adoption of the amended Section 64, nevertheless the rules of construction laid down in this decision are just as applicable to the amended statute as to the original Section 63.

In the opinion in this case, the court uses the following language:

> "The qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the

consequences of the sale are avoided if subsequently it develops that the bank was insolvent at the time of transfer in the sense that its assets were then unequal to the discharge of its liabilities when such fact was unknown to the seller of the stock at the time of the sale."

Further on in this opinion in discussing the question of what is meant by the term "insolvency" of a bank, the court clarifies that expression by the following language:

"The error of the argument arises from the fact that it affixes to the word 'insolvency' as found in the sentences quoted, the erroneous import hitherto pointed out; that is, an inadequacy of the assets of a bank to pay its liabilities, instead of giving to it its true meaning, that of failure and consequent suspension of business."

It is referred to and reaffirmed in the case of *McDonald, Receiver*, v. *Dewey et al.*, 202 U. S. 510, 50 L. Ed. 1128. From this case we take the following:

" 'Certainly,' said Mr. Justice White in the opinion (p. 46, L. Ed., p. 376, Sup. Ct. Rep., p. 256), 'it cannot in reason be said that the power would exist to sell stock like any other personal property, if, before the power could be exercised, the seller must examine the affairs of the bank, marshal its assets and liabilities, in order to form an accurate judgment as to the precise condition of the bank.'

"In discussing the question in regard to the validity of the transfer, it was said (p. 49, L. Ed., p. 377, Sup. Ct. Rep., p. 257) that 'the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts. The qualification just stated gives no support to the proposition that, where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it

developed that the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale.'"

* * * * * * *

"1. We think it a proper deduction from the prior cases, and such we hold to be the law, that the gist of the liability is the fraud implied in selling with notice of the insolvency of the bank, and with intent to evade the double liability imposed upon the stockholder by the national banking act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability. The fact that the sale was made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank. The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank. This was practically the rule in *Earle* v. *Carson*, in which we held that a *bona fide* sale would not be void, though the vendee were insolvent, if the fact of such insolvency were at the time unknown to the seller. The case of *Earle* v. *Carson*, so far from lending countenance to the argument of the appellees, bears strongly in the opposite direction."

We next call attention to the case of *Hodges* v. *Meriweather*, (C. C. A. 8) 55 F. 2d 29. This is a case decided under the provisions of Section 64. The third paragraph of the syllabus reads as follows:

"3. Banks and Banking 249 (1).

"Stockholders, transferring shares *bona fide* over 60 days from bank's failure, without knowing or having reason to believe that bank is insolvent, is not

subject to stockholder's liability (12 U. S. C. A., Sec. 64)."

We next refer to the case of *Fowler* v. *Crouse et al.*, (C. C. A.) 175 Fed. 646, the first paragraph of the syllabus reads as follows:

> "1. Banks and Banking (Section 249)—National Banks—Double liability of stockholders—Transfer of stock.
>
> "A Stockholder in a national bank divests himself of the double liability imposed by the statute for the protection of creditors by a transfer of his stock when the bank is solvent, or even if insolvent, by a *bona fide* transfer without knowledge of the insolvency; the only ground for holding him liable after a transfer being fraud."

The exact question involved in this case has been passed upon in the case of *Brown* v. *Rosenbaum*, (Ct. App. N. Y.) 287 N. Y. 510, 41 N. E. 2d 77. Certiorari denied by the United States Supreme Court May 25, 1942; 62 S. Ct. 1282, 86 L. Ed. 1760. This case interprets the provisions of Section 64 and as to what is meant by the language "failure of such association to meet its obligations or with knowledge of such impending failure," and if the law is as stated in this decision, which has been approved by this court by its refusal to grant certiorari, then there is no question but what this judgment against M. C. Garber must be reversed. We adopt the following extract from that case as a part of our argument. The first head-note in the above entitled case reads as follows:

> "1. Banks and Banking 248 (1).
>
> "A bank has not failed to meet its obligations within statute imposing liability on stockholders of national bank which fails to meet its obligations, so long as the bank pays its obligations at the time and place they are payable."

* * * * * * *

"Congress has not, however, provided that the liability of stockholders like the rights of creditors against an insolvent bank, attaches at the date of an 'act of insolvency.' Congress has expressly provided that liability of stockholders of an insolvent banking association attaches and becomes fixed upon 'the date of the failure of such association to meet its obligations.' The time when it appears that insolvency makes it impossible for a bank to meet all its obligations as they mature has been chosen by Congress as the appropriate date upon which the rights of creditors against the bank attach; *the time when a bank is actually in default in meeting its obligations as they become due has been decreed by Congress as the appropriate date upon which the liability of stockholders of the bank attaches.* Often, perhaps usually, the dates will coincide—not always (Emphasis ours)."

Again in the opinion in that case, that court said in referring to the date when a bank fails to meet its obligations as follows:

"The Comptroller of the Currency is not charged with the responsibility to fix that date. It is fixed according to statute by an act of default, not by an act of insolvency, and the courts must determine when such an act has occurred."

We earnestly request this court to examine the entire opinion in the above case.

In further support of our contention, we cite the following cases:

*Fowler* v. *Crouse et al.*, (C. C. A.) 175 Fed. 646.
*Hodges* v. *Meriweather*, (C. C. A.) 55 F. 2d 29.
*Hamilton* v. *Offutt et al.*, 78 F. 2d 735.
*Brunswick Terminal Company* v. *National Bank*, 192 U. S. 386, 48 L. Ed. 491.

**2. Upon the question of the interpretation of that part of Par. 64, Title 12, U. S. C. A., providing that the stockholders of every national banking association shall be held individually responsible for all "'contracts, debts and engagements' of such association, etc."**

We have heretofore quoted the language of the Ciruit Court of Appeals in disposing of this question. Before discussing the case of *Oppenheimer* v. *Harriman National Bank and Trust Company*, to which reference has heretofore been made in our assignment of reasons for the issuance of the writ, we desire to refer to former decisions of this court and other courts and then discuss it last.

That the judgment sought to be enforced in this case is based upon a tort, is an undisputed fact in this case. In the opinion of the Circuit Court of Appeals (see Record page 425) it is said:

> "Appellees' claim was an unliquidated demand founded in a tort of a very controversial nature, as is evidenced by the fact that the judgment was sustained by the Supreme Court by a bare majority."

This judgment may be enforced by the respondents by subjecting thereto any assets belonging to the American National Bank as a bank, but this does not include the liability created by statute for the benefit of creditors casting a double liability upon a stockholder for all "contracts, debts and engagements" of the bank. The language quoted, we contend, refers to contractual obligations, express or implied. This court has spoken on this question several times.

We first call attention to the case of *Schrader, Assignee*, v. *The Manufacturers' National Bank of Chicago et al.*, (U. S.) 33 L. Ed. 564, 133 U. S. 67, and copy there-

from the first paragraph of the syllabus and extracts from the opinion, which read as follows:

> "1. The individual liability of the stockholders of the national banks, as imposed by and expressed in the statute, is for all the contracts, debts and engagements of such banks, but is restricted to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business."
>
> * * * * * * *
>
> "The individual liability of the stockholders, as imposed by and expressed in the statute, is indeed for all the contracts, debts and engagements of such association, but that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business."

We next call attention to the case of *Ward* v. *Joslin*, (U. S.) 46 L. Ed. 1093, 186 U. S. 142, and take from the opinion in that case the following extracts:

> "* * * In *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. Ed. 587, 20 Sup. Ct. Rep. 477, it was said that 'the word "dues" is one of general significance, and includes all contractual obligations.' Can an obligation which a corporation had no right to incur be a contractual obligation and the basis of 'dues,' as that word is used in the State Constitution? We do not think so. It appears to us that it was not intended by that instrument to impose individual liability on stockholders in respect of risks which they had not undertaken.
>
> "One of the grounds on which the doctrine of *ultra vires* rests, is that the interest of the stockholders ought not to be subjected to such risks. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation."

This question has engaged the attention of the courts, both State and Federal, many times, and in support thereof we call attention to the case of *Clinton Mining and Mineral Company* v. *Beacom*, 264 Fed. 228. This was an action in which the plaintiff, a corporation of the State of Iowa, recovered a judgment in an action of tort against the Imperial Gold Mining and Milling Company, a corporation of the State of South Dakota. The judgment being unpaid, the plaintiff brought the action against the defendant as a stockholder of the Imperial Company to recover for an alleged balance unpaid upon his stock. The action was brought under Section 441 of the Civil Code of South Dakota, which provided that each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him, and that any creditor of the corporation may institute joint or several actions against any of its stockholders that have not fully paid the capital stock held by them, etc.

We next call attention to the case of *Luikart* v. *Jones*, 293 N. W. 346. This was an action to recover double liability from stockholders of the Bank of Benkelman, Nebraska, by the receiver of that bank under the provisions of Section 7, Article XII, of the Constitution of Nebraska, which was in force at the time of the transaction involved, but was thereafter repealed. From the opinion in that case we extract the following:

> " 'Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof.' *Luikart* v. *Paine*, 126 Neb. 251, 253 N. W. 86."
>
> * * * * * * *
>
> "(5) If it be found that these acts took place in violation of the strict terms of the law, then the

attempted liquidation would be *ultra vires* and stockholders are not liable for unauthorized or *ultra vires* acts or debts of a bank, unless they have assented thereto, or estopped themselves from denying liability to the same (C. J. S., Banks and Banking, 156, Sec. 80).

"It has been held that when a stockholder is sued by virtue of his constitutional and statutory liability, he is liable only for indebtedness incurred in the transaction of the legal and contemplated business of the corporation, and it is pointed out that 'One of the grounds on which the doctrine of *ultra vires* rests, is that the interest of the stockholders ought not to be subjected to such risks. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation.' *Ward* v. *Joslin*, 186 U. S. 142, 22 S. Ct. 806, 810, 46 L. Ed. 1093."

This exact question has been passed upon in the case of *Capital National Bank of St. Paul* v. *Bartley et al.*, (Mont.) 56 Pac. 2d 728. This was an action brought by the Capital National Bank of St. Paul against Anna H. Bartley and another as executors of the last will of P. B. Bartley, deceased, and others for the purpose of compelling the estate of P. B. Bartley, deceased, to contribute with Bartley's co-stockholders in the Conrad Trust and Savings Bank of Helena toward the satisfaction of a judgment secured by it against the Conrad Bank. The judgment in question was based upon a cause of action for tort and the judgment creditor sought to enforce this judgment against the stockholders of the Conrad Bank under the double liability provision of the Montana statute which is identical with the Federal Statute, Sec. 5151, U. S. C. A., Title 12, Par. 63.

In that case the defendants raised the identical question that we are raising in the case at bar to the effect that a cause of action for tort is not embraced within the expression "contracts, debts and engagements" of the bank.

The Supreme Court of Montana, in an elaborate opinion in the foregoing case, which we adopt as a part of our argument, reviews, the authorities, both state and federal, and holds that a judgment against a bank for a tort cannot be enforced against the stockholders of the bank under the double liability provision for "contracts, debts and engagements" of the bank.

We copy the second, third and fourth paragraphs of the syllabus in that case, which are as follows:

"1. Banks and banking. Key 47 (1).

"Double liability of bank stockholders was not known to common law and would not exist but for statute (Laws, 1927, Ch. 89, Par. 21).

"2. Banks and banking. Key 47 (1).

"Words 'contracts, debts and engagements,' within statute imposing liability on bank stockholders for all contracts, debts, and engagements of bank to extent of amount of their stock therein, held not to comprehend every kind of liability (Laws, 1927, Ch. 89, Par. 21).

"3. Banks and banking. Key 47 (1).

"Terms 'contracts' and 'engagements,' within statute imposing double liability on bank stockholders for all contracts, debts, and engagements of bank to extent of amount of their stock therein, have much the same meaning, 'engagements' being sometimes defined as *quasi* contracts, and each term denotes a voluntarily assumed obligation and does not include torts (Laws, 1927, Ch. 89, Par. 21; Rev. Codes, 1921, Par. 7467).

"4. Banks and banking. Key 47 (1).

"Statute imposing liability upon bank stockholders for all contracts, debts, and engagements of bank to extent of amount of their stock therein, held not to extend liability to torts or to judgments secured on tort actions; term 'debts' not covering torts (Laws, 1927, Ch. 89, Par. 21; Rev. Codes, 1921, Par. 7467)."

The opinion in that case is a brief on the question involved in this application and we request the court to examine the same in its entirety.

Passing now to the case of *Oppenheimer* v. *Harriman National Bank and Trust Company*, 201 U. S. 206, 81 L. Ed. 042, upon which the Circuit Court of Appeals rested its decision, we find that it was an action brought by Oppenheimer as plaintiff against the Harriman National Bank nd Trust Company as a bank upon an executed recision of sale to him of stock of the bank by the officers of the bank nd in which transaction he had purchased ten shares of he bank's stock for $15,120 and paid for it out of the money hich he had on deposit in the bank. He thereafter rescinded the contract and sued to recover his money back. n that case Mr. Justice Butler in delivering the opinion of is court said:

"For some years prior to the occurrences out of which this litigation arose, the defendant bank was doing business in New York City. Being unable to meet current demands, it closed March 3, 1933. March 13th a conservator was appointed. October 16th the comptroller declared it insolvent and appointed a receiver. Later, he assessed the stockholders par value of their stock. May 31st Oppenheimer brought this action in the Federal Court for the Southern District of New York, to recover damages upon an executed recision of a sale to him of stock of the bank by means of fraudulent representations made by its president and vice-president."

Oppenheimer sought to enforce his judgment out of the assets of the failed and insolvent bank, which were in the hands of a receiver appointed by the Comptroller of the Currency and which assets include the 100% assessment levied against the stockholders by direction of the Comptroller of the Currency. It is so well settled that an assessment made by order of the Comptroller of the Currency against the stockholders of an insolvent bank is a finality and that the funds derived therefrom become assets of the bank for the benefit of its creditors, that no citation of authorities in support thereof is necessary. Further on in the opinion, the court says:

> "3. Defendant maintains that the proceeds of assessments may not be charged with the claim of rescinding shareholder.
>
> "It argues that, the bank being insolvent and in receivership, the recovery cannot be had from the assets of the bank and will of necessity come out of the money paid by shareholders. It calls attention to Section 64 which declares that stockholders shall be held individually responsible for all 'contracts, debts, and engagements' of the bank.
>
> "But that contention misconstrues the judgment directed below. It is to be 'collectible out of the assets of the receivership after payment in full' of others. Manifestly the assets referred to are not limited to assessments collected from stockholders but include assets passing from the bank to the receiver. The phrase quoted * * * (213) from * * * Section 64 relates to the liability of stockholders enforceable upon finding of insolvency, appointment of receiver and assessment by the comptroller, and not to provability or rank of claims. His determination as to the necessity of and amount of assessments against shareholders is conclusive upon him and immune from collateral attack. The bank may not in this suit invoke the rights of stockholders to defeat plaintiff's claim against it."

Further on in the opinion, the court also says that a claim such as was asserted by the plaintiff in this case against the bank for the money that the bank got from the plaintiff for the purchase price of its stock is covered by the phrase "contract, debts and engagements" and also holds that the plaintiff Oppenheimer, was entitled to share equally in the receivership estate with other unsecured creditors' claims.

We think that this explanation of the case shows the distinction between it and the case at bar where in the Oppenheimer case the plaintiff was seeking to enforce his claim and judgment against the assets of the bank which had been collected by the receiver and were in his hand for the purpose of being applied to claims against the bank which is an entirely different proposition from the case at bar where the plaintiffs bring suit directly against the stockholders under the provisions of Pars. 63 and 64, Title 12, U. S. C. A.

We call especial attention to the closing paragraph of the above quotation from the decision of this court in the Oppenheimer case:

> "The bank may not in this suit invoke the rights of stockholders to defeat plaintiff's claim against it."

This would seem to imply that a stockholder could have made the defense that he was not liable where the bank could not.

We think that this court should review the Oppenheimer case and the other authorities cited and make it definite and clear as to whether or not under this double liability statute a stockholder can be made liable for the payment of a judgment based on tort against the bank and which we contend is not the intent of the statute.

3. As to Reason No. 3, referring to the question of the Statute of Limitations and laches, these questions will be presented in the event Certiorari is granted and the court comes to a consideration of the case upon its merits, but as these questions standing alone would probably not impel the court to grant Certiorari, we will refrain from discussing them at this time.

We submit that for all of the reasons heretofore given, this court should grant the prayer of the petition of the petitioner.

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